Supreme Court, U.S.
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No. 00-1853

In the

Supreme Court of the United States

AKOS SWIERKIEWICZ,
Petitoner,

v.

SOREMA N.A.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Must an employment discrimination plaintiff do more in his complaint than put his employer on notice of his discrimination claims, *i.e.*, must he also plead specific facts showing that at trial he can make out a *prima facie* case of discrimination under *McDonnell Douglas v. Green*?

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JURISDICTION

The judgment below was entered on March 12, 2001 by the United States Court of Appeals for the Second Circuit. On September 25, 2001, this Court granted Mr. Swierkiewicz's petition for writ of certiorari. Jurisdiction here is conferred by 28 U.S.C. § 1254 (1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 8 (a) (2) of the Federal Rules of Civil Procedure provides in relevant part: "A pleading . . . shall contain . . . a short and plain statement of the claim showing the pleader is entitled to relief . . ."

Rule 9 (b) of the Federal Rules of Civil Procedure states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other conditions of mind of a person may be averred generally."

Rule 12 (b) (6) of the Federal Rules of Civil Procedure permits the filing of a motion to dismiss for "failure to state a claim upon which relief can be granted."

STATEMENT OF THE CASE

Fired from his job, Akos Swierkiewicz sued his former employer, Sorema N.A. ("Sorema"), on claims of national origin and age discrimination. His national origin claim was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* ("Title VII"); his age discrimination claim was based on the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et. seq.* ("ADEA").

A. COURSE OF PROCEEDINGS BELOW

Mr. Swierkiewicz's two count complaint was filed in the United States District Court for the Eastern District of Pennsylvania. On Sorema's motion, the action was transferred to the United States District Court for the Southern District of New York. Post-transfer, Sorema filed a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure seeking dismissal of the complaint on the ground that it failed to state a claim upon which relief could be granted. As pertinent here, it argued that the allegations of the complaint were "conclusory" and "fail[ed] to state a *prima facie* case of discrimination based on national origin or age." JA 17a; *see also* Memorandum in Support of Defendant's Motion to Dismiss at 8-13. With its motion, Sorema submitted an affidavit from its trial counsel that contained uncorroborated hearsay allegations that went well beyond the four corners of the complaint. JA 15a-17a. Mr. Swierkiewicz opposed the motion and objected to the improper allegations in defense counsel's affidavit.[1]

[1]The affidavit essentially rewrote the complaint so that it could be read in the light most favorable to Sorema. For example, while the complaint alleged that Mr. Swierkiewicz was demoted in 1995 on account of his national origin and age, JA 6a (¶ 19), the affidavit asserted there was no demotion, but rather, "a reorganization occurred at Sorema which resulted in *changes* in Swierkiewicz's job responsibilities." JA 16a (¶ 3), (emphasis added). Moreover, while the complaint alleged that after two years of discrimination following his demotion, Mr. Swierkiewicz sent a memo to Sorema's Chief Executive Officer ("CEO") outlining his grievances and requesting a severance agreement to resolve them, JA 8a (¶ 30), defense counsel's affidavit asserted, without reference to the two years of discrimination Mr. Swierkiewicz suffered, that he wrote the memo because "he was unhappy with his job and intended to leave the company . . ." JA 16a (¶ 4). Finally, while the complaint alleged that after receiving the memo Sorema's CEO gave Mr. Swierkiewicz two options – quit without a severance package or be fired – and that he was fired because he refused to quit, JA 9a (¶¶ 32-34), defense counsel's affidavit asserted he was fired because he "went to his office and cleared out all of his personal belongings [and then] refused to resign because Sorema did not grant him the severance he demanded." JA 16a (¶¶ 4-5). None of defense counsel's hearsay assertions can be squared with the allegations of the complaint nor can they be reasonably inferred from those allegations.

Shortly thereafter, while the motion to dismiss was still pending, Mr. Swierkiewicz amended his complaint as of course to add two supplemental claims for relief against Sorema. JA 22a-30a. These claims asserted that Sorema fired him on account of his national origin and age in violation of both New York State and City law. JA 29a (¶¶ 46-49). In response, Sorema renewed its motion to dismiss and repeated its assertion that the allegations of the amended complaint were conclusory and failed to make out a *prima facie* case of discrimination. In doing so, it submitted yet another affidavit from its trial counsel in support of the motion.[2]

After hearing oral argument, the district court granted Sorema's motion and dismissed the amended complaint with

[2]*See* JA 31a. In that affidavit, defense counsel attached a copy of a memorandum that Mr. Swierkiewicz wrote to Sorema's CEO in which he requested a severance package to resolve his grievances against the company. In the affidavit, defense counsel stated she was submitting the memorandum "[p]ursuant to the Court's request." JA 31a (¶ 1). Counsel for Mr. Swierkiewicz, however, was never made privy to that request, nor is it reflected on the district court docket entries; the first he became aware of the request was upon receipt of defense counsel's affidavit.

prejudice. JA 37a-43a.[3] Analyzing the case under the rubric of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), it held that Mr. Swierkiewicz had adequately pled membership in a protected class, was qualified to perform his job and (it assumed *arguendo*) had suffered an adverse employment action. JA 38a. Nonetheless, despite five paragraphs in the amended complaint explicitly averring that Mr. Swierkiewicz was fired by Sorema on account of his national origin and age, JA 27a-29a (¶ ¶ 37, 43, 45, 47 and 49), the district court concluded he had "not adequately alleged a *prima facie* case . . . [to] support an inference of discrimination." JA 40a and 42a. Having dismissed Mr. Swierkiewicz's Title VII and ADEA claims on that basis, the district court then dismissed his pendent State and City law claims because "no additional facts" had been pled that would "cure the deficiencies in the federal claim[s]." JA 42a.[4]

Mr. Swierkiewicz appealed the dismissal of his action to the Second Circuit. Citing Rule 8(a)(2) of the Federal Rules of Civil Procedure, caselaw from this Court and five circuit courts of appeals, he contended that, at the pleadings stage, his amended complaint should have been analyzed

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[3]In its ruling, the district court stated that it did not rely on the uncorroborated hearsay allegations contained in the first affidavit of defense counsel. JA 38a. Sorema, nonetheless, insisted that the full affidavit be included in the Joint Appendix filed in the Second Circuit. It then proceeded to rely on the affidavit's hearsay allegations in its brief in support of affirmance.

[4]After dismissing the amended complaint, the district court refused Mr. Swierkiewicz's request for leave to amend paragraph 38 of his amended complaint to assert that due to his national origin and age he was denied severance benefits that Sorema routinely granted to other executives – five of whom he identified by name and each of whom, unlike Mr. Swierkiewicz, was fired for cause. JA 44a-45a; *see* ¶ 38 of the amended complaint at JA 27a; *and see* JA 44a (the request to amend ¶ 38). The district court stated that any such amendment would be "futile". JA 45a.

solely to determine if he had adequately put Sorema on notice of his discrimination claims – and not whether he could make out at trial a *prima facie* case of discrimination under *McDonnell Douglas v. Green*. Notwithstanding his argument, the Second Circuit affirmed the district court. It too analyzed the amended complaint under *McDonnell Douglas v. Green* and, having done so, it dismissed Mr. Swierkiewicz's allegations as "conclusory" and "insufficient as a matter of law to raise an inference of discrimination." JA 48a and 49a.

B. STATEMENT OF FACTS

As pled in the nine page amended complaint, Sorema is a French owned and controlled reinsurance company. JA 24a (¶ 14). In April 1989, Sorema hired Mr. Swierkiewicz, who is Hungarian, as a Senior Vice President and Chief Underwriting Officer ("CUO"). *Id.* (¶¶ 12 and 17). In all respects, he performed his job in a satisfactory and exemplary manner. JA 25a (¶ 18). However, in February 1995, Francois Chavel, a French national and Sorema's Chief Executive Officer, demoted Mr. Swierkiewicz and transferred the bulk of his CUO duties to another French national, Nicholas Papadopoulo. *Id.* (¶ 19). Mr. Papadopoulo was 32 years old at the time – 16 years younger and far less experienced than Mr. Swierkiewicz. *Id.* (¶¶ 19 and 22). When he made the decision, Mr. Chavel told Mr. Swierkiewicz he took the action to "energize" the underwriting department – clearly implying he felt Mr. Swierkiewicz was too old for the job. *Id.* (¶ 23).

A year later, Mr. Chavel formally appointed Mr. Papadopoulo to the CUO position. *Id.* (¶ 21). Mr. Swierkiewicz, by contrast, was relegated to a marketing and services position. *Id.* (¶ 19). In the meanwhile, much younger and less qualified employees were hired and promoted by Sorema to jobs which he was clearly qualified

to perform. JA 25a-26a (¶¶ 24-27). For example, Michel Gouze, another French national, was hired as Sorema's Vice President in charge of Marketing, but he had virtually no experience in the insurance or reinsurance business and thus had to rely on Mr. Swierkiewicz to perform his duties. JA 26a (¶¶ 26-28). Another employee, Daniel Peed, who was much younger than Mr. Swierkiewicz and who had previously reported to him, was promoted to the position of Senior Vice President of Risk Property. *Id.* (¶¶ 24-25). These decisions had nothing to do with Mr. Swierkiewicz's performance; quite the contrary, he was demoted on account of his national origin and age. JA 25a (¶ 20).[5]

Over the course of the next two years, Mr. Chavel continued to discriminate against Mr. Swierkiewicz on account of his national origin and age. JA 26a (¶¶ 29-31). He did so by isolating him, excluding him from business decisions and meetings, and denying him any opportunity for career growth at Sorema. *Id.* (¶ 29). Mr. Swierkiewicz tried to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subject, but his efforts were unavailing. *Id.* (¶ 30). Finally, on April 14, 1997, after two years of ongoing discrimination, Mr. Swierkiewicz sent Mr. Chavel a memo outlining his grievances and requesting a severance package from Sorema. *Id.* (¶ 31). Mr. Chavel did not respond to the memo. JA 27a. (¶ 32). Fifteen days later, on April 29, 1997, Mr. Chavel and Sorema's General Counsel met with Mr. Swierkiewicz and gave him an ultimatum:

[5]The Second Circuit erroneously characterized Mr. Swierkiewicz's demotion and reassignment as a "shift[ ]" and "transition" in his job responsibilities. JA 47a. These terms do not appear anywhere in the initial or amended complaints. To the contrary, both complaints characterize these job actions as a "demotion" based on Mr. Swierkiewicz's national origin and age. *See* JA 6a (¶ 19) and JA 25a (¶ 20). It is likely that the Second Circuit's mistaken characterization was drawn from the inadmissible hearsay allegations contained in defense counsel's first affidavit. JA 16a (¶ 3).

either resign without a severance package or be fired. *Id.* (¶ 33). Mr. Swierkiewicz refused to resign; whereupon, Mr. Chavel fired him effective that very day. *Id.* (¶¶ 34-35). There was no valid basis for the termination; it was, rather, motivated by Mr. Swierkiewicz's national origin and age (he was 50 at the time). *Id.* (¶¶ 36-37). Moreover, unlike other Sorema executives who were fired for cause and who nonetheless received generous severance packages from the company, Mr. Swierkiewicz, who was not fired for cause, was denied severance pay and benefits by Sorema. This too was motivated by his national origin and age. *Id.* (¶ 38); *see also* JA 44a-45a.

SUMMARY OF ARGUMENT

In affirming the dismissal of Mr. Swierkiewicz's amended complaint on the ground that its averments of discrimination were "conclusory," the Second Circuit in effect rewrote history. The battle between fact-pleading and simplified notice pleading was waged and resolved in 1938 when, in adopting the Federal Rules of Civil Procedure, this Court opted for the "short and plain statement" standard set out in Rule 8(a)(2) of the Federal Rules. Any misgivings or doubts about the propriety of the simplified notice pleading standard of Rule 8(a)(2) were effectively ended by the Court's unanimous opinion nineteen years later in *Conley v. Gibson*, 355 U.S. 41 (1957).

Years passed, however, and a new era encroached on *Conley* and Rule 8(a)(2) as a number of courts adopted a "heightened pleading" requirement for cases alleging violations of the civil rights laws. This too was rebuffed, again unanimously, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Still, the Second Circuit refused to yield, continuing as it had before to require fact-pleading in employment discrimination cases. But its rule is flatly inconsistent with *Conley*, *Leatherman* and Rule 8(a)(2) itself. Moreover, its attendant requirement that plaintiffs must plead the elements of a *McDonnell Douglas prima facie* case mistakes principles of pleading with principles of evidence. *McDonnell Douglas* is an evidentiary test – and just one of several – that a plaintiff must satisfy at trial. But requiring proof of discrimination at the pleadings stage, before the plaintiff has even had an opportunity for discovery, defeats the goal of Rule 8(a)(2) – simplified notice pleading followed by discovery, summary judgment or trial.

The Second Circuit's fact pleading requirement also exacts too high a price for many employment discrimination

plaintiffs. In today's environment, few defendants leave "smoking gun" evidence of their unlawful conduct. Yet at the same time these very defendants house the facts that plaintiffs need to prove their cases through circumstantial evidence. Consequently, requiring plaintiffs to aver in their complaints facts they cannot obtain without discovery dooms many worthy cases.

In this case, viewed properly through the simplified notice pleading standard of the Federal Rules, Mr. Swierkiewicz pled more than enough to defeat Sorema's motion to dismiss. Five times he alleged that Sorema fired him on account of his national origin and age. Moreover, he supported those conclusions with the following factual allegations: in 1995 he was demoted in favor of a much younger French national; in the succeeding two years, he was isolated, excluded from meetings and denied any opportunity for career growth. In the meanwhile, Sorema assigned much younger employees, including at least one other French national, to positions he was more qualified and experienced to perform. After efforts to resolve these conditions proved unsuccessful, Mr. Swierkiewicz sent a memorandum to Sorema's CEO seeking a severance package to resolve his grievances. Fifteen days later, he was fired on the spot without any severance package despite the fact that Sorema typically gave such packages to terminated employees (even ones, unlike him, terminated for cause). Taken together, these allegations of national origin and age discrimination were more than sufficient to take Mr. Swierkiewicz's Title VII and ADEA claims past the pleadings stage.

ARGUMENT

I. NOTICE PLEADING IS ALL THE FEDERAL RULES REQUIRE: TO DEMAND MORE AS THE SECOND CIRCUIT DID IS INCONSISTENT WITH THIS COURT'S PRECEDENTS, THE GOAL OF RULE 8(A)(2) AND CASELAW FROM OTHER CIRCUITS

The Second Circuit's decision – dismissing Mr. Swierkiewicz's amended complaint for being insufficiently fact-specific and failing to establish a *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) – represents a marked departure from this Court's notice pleading precedents. *See, e.g., Conley v. Gibson*, 355 U.S. 41 (1957) and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). It also undermines the goal of Rule 8(a)(2) of the Federal Rules of Civil Procedure – the promotion of simplified pleading practice in federal district courts. *See, e.g.*, Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1942) (hereafter Clark, *Simplified Pleading*). Finally, the Second Circuit's decision conflates and confuses principles of pleading with principles of evidence in sharp contrast to the distinction drawn between the two by every other court of appeals that has considered the subject. *See, e.g., Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C. Cir. 2000). For all these reasons, discussed more fully below, the Second Circuit's heightened pleading requirement has little to commend it and, therefore, should be rejected.

A. This Court's Precedents Have Unanimously and Consistently Upheld the Principle of Notice Pleading

The Second Circuit misconceived both its role and the applicable standard of review it was required to apply in

assessing the amended complaint. Its role was "necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*

To answer that question, reviewing courts must determine whether a plaintiff has stated "a claim upon which relief can be granted." Rule 12(b)(6), F.R.Civ.P. Ever since 1938, when the simplified notice pleading standard of the Federal Rules of Civil Procedure was first adopted, that has been construed to mean that a plaintiff has the duty – but no more than this is required – to put the defendant on notice of the nature of his action. *Conley v. Gibson*, 355 U.S. at 47. Fact pleading, a pre-1938 feature of code and common law practice, has long ago been abandoned in favor of "a short and plain statement of the claim showing that the pleader is entitled to relief", Rule 8(a)(2), F.R.Civ.P., and "the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 47-48 (footnote omitted).[6]

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[6]As Dean of the Yale Law School and the Reporter for the Advisory Committee that drafted the Federal Rules of Civil Procedure, and later as Judge and Chief Judge for the United States Court of Appeals for the Second Circuit, Charles E. Clark was the principal architect for the sea change wrought by the simplified notice pleading standard of the 1938 Rules. In an article he wrote in 1957, he remarked:

> The intent and effect of the rules is to permit the claim to be stated in general terms: the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement.

Employment discrimination and other civil rights claims are not exceptions to the notice pleading standard of the Federal Rules. Indeed, *Conley* itself was a class action by African American railroad clerks who claimed their union had breached its duty of fair representation and discriminated against them in violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq*. In reversing the Rule 12(b)(6) dismissal of their complaint, this Court unanimously rejected the union's argument that the complaint was insufficiently fact-specific, stating:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

355 U.S. at 47 (footnote omitted).

Seventeen years later, in *Scheuer*, another civil rights action, the Court unanimously cautioned lower federal courts against the too hasty dismissal of complaints based on their preliminary sense that recovery was "very remote." 416 U.S.

Honorable Charles E. Clark, *Special Pleading In The "Big Case"*, 21 F.R.D. 45, 47 (1957) (inside quotation and footnote omitted). *See also* Thomas O. Main, *Procedural Uniformity And The Exaggerated Role of Rules: A Survey of Intra-State Uniformity In Three States That Have Not Adopted The Federal Rules of Civil Procedure*, 46 Vill. L. Rev. 311, 327 (2001): "The drafters of the Federal Rules expressly rejected the code pleading requirement that complaints set forth facts sufficient to state a cause of action. Indeed, Rule 8(a)(2) was drafted deliberately to avoid usage of the terms 'fact' and 'cause of action,' and the confusion they caused."

at 236. Remoteness of recovery, the Court said, "is not the test." *Id.* Rather, "the complaint should be construed favorably to the pleader," *id.*, and allowed to proceed through discovery and then through summary judgment or trial. *Id.* at 250. Dismissal for failure to state a claim should only occur when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Id.* at 236, *quoting Conley*, 355 U.S. at 45-46.

Despite the holdings in *Conley* and *Scheuer*, a number of lower federal courts continued to hold civil rights plaintiffs to a higher pleading standard than otherwise required by Rule 8(a)(2). The trend in that direction was noted in a 1986 law review article. *See* Richard L. Marcus, *The Revival of Fact Pleading Under The Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433 (1986). In 1993, however, the Court unanimously held that any such heightened pleading requirement was improper. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, supra.* In an opinion by the Chief Justice, the Court stated: "We think that it is impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." 507 U.S. at 168. The Chief Justice went on to say that in the absence of any amendment to the notice pleading standard of the Federal Rules, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 168-169.

Here, instead of deferring to the principle of notice pleading, the Second Circuit chastised Mr. Swierkiewicz for his "conclusory" allegations which, it held, were insufficient to "raise an inference of discrimination [against Sorema]." JA 49a. The District Court also rebuked Mr. Swierkiewicz for the same alleged defects. JA 40a (dismissing the amended complaint for alleging "in a conclusory fashion that he was terminated as a result of his age and national origin.").

These rulings were clearly improper. Five times in his amended complaint, Mr. Swierkiewicz pled that he was fired by Sorema on account of his national origin and his age. JA 27a-29a (¶¶ 37, 43, 45, 47 and 49) – and he supported those contentions with specific allegations of discrimination. Under the notice pleading standard of the Federal Rules, that was sufficient to take his case past the pleadings stage and on to either summary judgment or trial. *Accord Scheuer*, 416 U.S. at 250. *See also Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) ("summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial").

B. The Goal of Rule 8(a)(2) Is Simplicity of Pleadings

The Second Circuit's departure from notice pleading principles is particularly ironic because the principal drafter of the Federal Rules of Civil Procedure was Charles E. Clark. *See* n.6 *supra*. In 1939, a year after the Rules were adopted, he became a judge on the Second Circuit where he served until his death in 1963. From 1954 to 1959 he was the Chief Judge of that Court. And from 1935 to 1956 he served as the Reporter for this Court's Committee on the Rules of Civil Procedure. *See* 4 *Who Was Who In America* 174 (1968).

Throughout his career, Judge Clark extolled the virtues of what he called the "simplified pleading" standard of the Federal Rules. *See, e.g.*, Clark, *Simplified Pleading*, *supra*, 2 F.R.D. at 456-458. "Strict special pleading," he remarked in another context, "has never been found workable." Honorable Charles E. Clark, *Special Pleading In The "Big Case"*, 21 F.R.D. 45, 47 (1957) (hereafter Clark, *Special Pleading In The "Big Case"*).[7]

[7]There are but two exceptions to the simplified pleading standard of Rule 8(a)(2) – cases alleging fraud or mistake. These are governed by Rule 9(b) of the Federal Rules of Civil Procedure which states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Clearly, civil rights cases are exempt from the "particularity" requirement of Rule 9(b). *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

As a judge on the Second Circuit, Judge Clark authored several opinions rejecting the argument that the Federal Rules of Civil Procedure required the pleading of facts. In *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), for example, he wrote of a complaint that had been dismissed on the ground that it was insufficiently fact-specific:

> . . . here is another instance of judicial haste which in the long run makes waste. Under the new rules of civil procedure, there is no pleading requirement of stating "facts sufficient to constitute a cause of action," but only that there be a "short and plain statement of the claim showing that the pleader is entitled to relief."

Id. at 775. Thirteen years later, in *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957), writing as Chief Judge, he refused to engraft a fact-pleading requirement onto cases alleging a violation of the antitrust laws. "We see no reason whatever to believe that the Supreme Court intended its liberal rules governing pleadings to be inapplicable to a suit for treble damages." *Id.* at 323 (inside citation and quotation omitted).[8]

[8]*Nagler* was written in the wake of efforts by the Ninth Circuit in 1952 to revive the fact-pleading rules of the former code practice. *See Claim or Cause of Action*, 13 F.R.D. 253 (1952). The Advisory Committee to the Federal Rules, however, rejected the proposal in 1955. *See Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts*, at 18-19 (1955). This Court's decision two years later in *Conley v. Gibson*, 355 U.S. 41 (1957), effectively ended the effort

As further evidence that the Federal Rules only envision a simplified form of notice pleading, the drafters appended to the Rules a series of form complaints that were, in the words of Rule 84, "intended to indicate the simplicity and brevity of statement which the rules contemplate." The forms, ironically, "assume[d] the action to be brought in the Southern District of New York." *See Introductory Statement to Appendix of Forms*. Form 9, a Complaint for Negligence, shows just how simplified and general an acceptable complaint may be. In the second of a three paragraph complaint, the form avers:

> On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant *negligently* drove a motor vehicle against plaintiff who was then crossing said highway (emphasis added).

Certainly if a complaint that does no more than allege negligence can survive a Rule 12(b)(6) motion to dismiss, a complaint averring that an employee was fired because of his national origin and age (though far more than that is alleged here by Mr. Swierkiewicz) must also be sufficient to overcome a defense motion to dismiss.

Moreover, even if more were needed, a defendant can resort to Rule 12(e) which allows for the filing of a motion for a more definite statement where the complaint is unduly "vague or ambiguous." Normally, however, such a motion should not be necessary in cases of employment discrimination. That is because before a plaintiff can file a Title VII or ADEA suit, he must first file a charge of discrimination with the Equal Employment Opportunity Commission. *See* 42 U.S.C. §§ 2000e-5(b) (Title VII) and 29

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to amend Rule 8(a)(2) which, to this day, remains in the same form as it was when adopted in 1938.

U.S.C. §§ 626(d) (ADEA). The charge must contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3) (Title VII). *See also* 29 C.F.R. 1626.8(a)(3) (same as to the ADEA). This exhaustion of remedies requirement provides the defendant with advance notice of the claim and an opportunity to be heard in response to it. *Cable v. Ivy Tech State College*, 200 F.3d 467, 477 (7th Cir. 1999). Unlike most other federal court defendants, therefore, a Title VII and ADEA defendant does not come to court bereft of facts. Under these circumstances, the simplified notice pleading standard of Rule 8(a)(2) is more than sufficient to inform a discrimination defendant of the nature of the claims against it. To require more, as the Second Circuit has done, is inconsistent with both the language and goal of Rule 8(a)(2).[9]

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[9]Based on our research, the Second Circuit began requiring employment discrimination plaintiffs to plead facts, rather than general averments, in a series of cases dating back to 1971. *See, e.g., Avins v. Mangum*, 450 F.2d 932, 933 (2d. Cir. 1971) (complaint dismissed because plaintiff's failure to hire claim was "wholly conclusory"). *See also Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 703 (2d Cir.) (complaint dismissed because it "contains nothing more than naked assertions"), *cert. denied*, 409 U.S. 883 (1972) and *Martin v. New York State Department of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978) (complaint that "only" alleged racial discrimination in the denial of plaintiff's salary and benefits dismissed because it consisted "of nothing more than naked assertions") (emphasis added). The Second Circuit has continued to require fact pleading in employment discrimination cases despite this Court's rejection of a heightened pleading requirement in *Leatherman*. *See, e.g., Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565-566 (2d Cir. 2000) (employing a fact-bound *McDonnell Douglas* test in dismissing plaintiff's Title VII failure to promote complaint) and *Tarshis v. Riese Organization*, 211 F.3d 30, 35 (2d Cir. 2000) (reversing the dismissal of a Title VII and ADEA complaint but reiterating its view that "bold assertions and conclusions of law will not suffice").

C. Caselaw From Other Circuits Properly Distinguishes Between Pleadings and Evidence

The Second Circuit also erred by analyzing the amended complaint as if, at the pleading stage, Mr. Swierkiewicz had to make out a *prima facie* case of discrimination under *McDonnell Douglas v. Green*. But the issue of whether a plaintiff has adequately put a defendant on notice of his discrimination claim is entirely distinct and analytically different from the separate question of whether he has enough evidence to sustain a verdict at trial. *Cf., e.g., Conley* and *Scheuer* under which complaints were analyzed to determine if they satisfied the notice pleading standard of Rule 8(a)(2) *with* cases like *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) under which the plaintiffs' evidence was reviewed to determine if they could succeed on the merits at trial. *McDonnell Douglas* plays little or no part in the former analysis; it does, however, play a significant role in the latter analysis. *See Reeves*, 530 U.S. at 142: "*McDonnell Douglas* and subsequent decisions have established an allocation of the burden of production and an order for the presentation of *proof* in . . . discriminatory treatment cases" (emphasis added; inside quotation omitted).

Every other court of appeals that has explicitly considered the question has recognized the difference between the adequacy of a plaintiff's pleading and the adequacy of the evidence he must adduce at trial to sustain a discrimination verdict. The pleading may be adequate but, after discovery and the refinement of the litigation, the evidence may be lacking. For that reason, the five other courts of appeals that have ruled on this precise issue – the District of Columbia, the Third, Seventh, Eighth and Ninth Circuits – have all uniformly held that "a plaintiff need not set forth the elements of a prima facie case at the initial pleading stage . . ." *Sparrow v. United Air Lines, Inc.*, *supra*,

216 F.3d at 1113. *Id.* at 1114: "Sparrow did not have to make out a prima facie case of discrimination in his complaint" (inside quotation omitted). *See also Weston v. Pennsylvania*, 251 F.3d 420, 429 (3d Cir. 2001) (eschewing any requirement of fact pleading and holding that "[d]iscrimination and other civil rights claims are clearly subject to notice pleading"); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (complaint need not set out the elements of a *prima facie* case: "I was turned down for a job because of my race is all a complaint has to say") (internal quotations omitted); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993) ("the *prima facie* case . . . analysis is an evidentiary standard – it defines the quantum of *proof* plaintiff must present to create a rebuttable presumption of discrimination . . . . Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim") (emphasis in original); and *Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir. 1996) ("A plaintiff need not make a *prima facie* showing to survive a motion to dismiss provided he otherwise sets forth a short and plain statement of his claim showing he is entitled to relief"). *See also* 2A *Moore's Federal Practice*, ¶ 8.13 at 8-68 (2d ed. 1989) ("The pleading of evidence should be avoided").

What separates the Second Circuit from these five Circuits is a fundamental difference of opinion between notice and fact pleading. But that divide was crossed in 1938 when the Federal Rules of Civil Procedure were adopted. Since then, save for the Second Circuit which has required civil rights complaints to plead facts and not "naked assertions," *see Martin v. New York State Department of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978), the rule has been that general notice pleading is all that is required in a complaint. As the Sixth Circuit stated earlier this year, "[r]equiring plaintiffs to include specific allegations in their complaints will create havoc by moving our system past the

basic pleading requirements of the Federal Rules." *EEOC v. J. H. Routh Packing Co.*, 246 F.3d 850, 855 (6th Cir. 2001). *See also Bennett v. Schmidt*, *supra*, 153 F.3d at 519 ("Litigants are entitled to discovery before being put to their proof, and treating the allegations of the complaint as a statement of a party's *proof* leads to windy complaints and defeats the function of Rule 8") (emphasis in original). The Second Circuit's contrary view in effect conflates the standard of review under Rule 12(b)(6) with the standards governing Rule 56 summary judgment motions and Rule 50 motions for judgment as a matter of law. There being no valid basis to conflate Rule 12 (b)(6) with either Rule 50 or Rule 56, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990), the Second Circuit's contrarian position should be rejected.

II. THE SECOND CIRCUIT'S HEIGHTENED PLEADING REQUIREMENT ACTS AS A DETERRENT TO VALID EMPLOYMENT DISCRIMINATION COMPLAINTS

Employment discrimination cases are challenging for plaintiffs and courts because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). The lack of direct evidence makes it "easier [for an employer] to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996). *See also Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) ("[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it"). The Second Circuit itself has acknowledged this reality:

> Because employers rarely leave a paper trail – or "smoking gun" – attesting to a discriminatory intent . . . disparate treatment plaintiffs must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. *Such determinations are, generally speaking, most competently and appropriately made by the trier of fact.*

Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) (emphasis added).

In order to build a circumstantial case of intentional discrimination, plaintiffs need discovery. But just as in antitrust cases where "the proof is largely in the hands of the conspirators," *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), so too in an employment discrimination case most of the critical evidence – for example, personnel records, salary information and the identity of the employee's replacement – is in the hands of the employer. *See, e.g., Reeves, supra*, 530 U.S. at 147 ("the employer is in the best position to put forth the actual reason for its decision"). Without that discovery, a plaintiff has little chance of success – a point made clear by many circuit courts. *See, e.g., Sempier v. Johnson & Higgins*, 45 F.3d 724, 733-736 (3d Cir.) (reversing the grant of summary judgment in favor of the employer because discovery was improperly curtailed by the district court), *cert. denied*, 515 U.S. 1159 (1995); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362-1363 (9th Cir. 1985) (holding summary judgment "patently inappropriate" because district court restricted plaintiff's ability to discover evidence necessary to establish a *prima facie* case of discrimination); and *Cedillo v. International Ass'n of Bridge & Structural Iron Workers*, 603 F.2d 7, 12 (7th Cir. 1979) (summary judgment reversed

because the district court improperly limited the plaintiff's right to discover information regarding the employer's motives).

In *McDonnell Douglas v. Green*, the Court catalogued some of the types of evidence that an individual plaintiff could use to prove, circumstantially, that he was the victim of unlawful employment discrimination. The Court's non-exclusive list included evidence showing how the employer treated non-protected employees who committed offenses comparable to the plaintiff's, the employer's prior treatment of the plaintiff, and the employer's "general policy and practice with respect to minority employment." 411 U.S. at 804-805 (footnote omitted).

In this case, Mr. Swierkiewicz never had an opportunity to take or receive any discovery from Sorema. Thus, due solely to the unwarranted dismissal of his lawsuit, Sorema never had to comply with the self-executing disclosure requirements of Rule 26 (a)(1) of the Federal Rules of Civil Procedure. Nor did Mr. Swierkiewicz ever have the chance to discover Sorema's reason for his employment termination; or why it was abrupt; or who made the decision; or the identity, age and national origin of his replacement; or how Sorema treated other terminated employees. Indeed, because he was fired on the spot without notice, he never had the opportunity to review or obtain his own personnel file or the files and records of other employees. All this discovery, through interrogatories, document requests and, most critically, depositions, would have been highly probative of his discrimination claims.

Caught in a Catch-22, Mr. Swierkiewicz was on the one hand required by the District Court and the Second Circuit to allege facts sufficient to make out a *prima facie* case of discrimination and, on the other hand, by virtue of the heightened pleading requirement those courts imposed on

him, he was precluded from taking discovery necessary to establish such a case. This not only prevented him from taking his case past the pleading stage, it also set too high a bar for other employment discrimination cases. As a recent law review article pointed out in commenting on this dilemma:

> When courts impose heightened pleading standards, they impose a burden of making specific factual allegations. Facts to support allegations of civil rights violations are, however, more often than not, in the hands of defendants. Accordingly, the imposition of a burden to plead specific factual allegations can be dispositive of many civil rights claims and have a chilling effect on still others.

Thomas O. Main, *Procedural Uniformity And The Exaggerated Role of Rules: A Survey of Intra-State Uniformity In Three States That Have Not Adopted The Federal Rules of Civil Procedure*, 46 Vill. L. Rev. 311, 327 (2001).

III. THE ALLEGATIONS OF THE AMENDED COMPLAINT SATISFIED THE NOTICE PLEADING STANDARD OF THE FEDERAL RULES

Whether viewed through the lens of the Second Circuit's heightened pleading requirement or, as it should have been, through the lens of Rule 8(a)(2)'s simplified notice standard, the allegations in Mr. Swierkiewicz's amended complaint were more than sufficient to defeat Sorema's motion to dismiss.[10]

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[10]Even were it necessary for a plaintiff at the pleadings stage to establish a *prima facie* case of discrimination (a counterintuitive assumption), the

Before recounting those allegations, two prefatory observations are necessary. First, in analyzing Sorema's motion to dismiss, the Second Circuit and the District Court were required to accept as true all the facts pled in the amended complaint and draw all reasonable references from those facts in favor of Mr. Swierkiewicz. *Conley v. Gibson*, *supra*, 355 U.S. at 45-46. Only if he could prove "no set of facts in support of his claim" should the amended complaint have been dismissed. *Id.* Second, and of particular importance here, the hearsay allegations in defense counsel's first affidavit, JA 16a (¶¶ 3-5), should not and cannot be considered in assessing the viability of the amended complaint. *See, e.g., Scheuer v. Rhodes*, *supra*, 416 U.S. at 249-250 and *Carter v. Stanton*, 405 U.S. 669, 671 (1972). *See also Great Atlantic & Pacific Tea Co. v. The Town of East Hampton*, 997 F. Supp. 340, 346 n.1 (E.D.N.Y. 1998) (refusing to consider an attorney's hearsay affidavit in ruling on a motion to dismiss). That affidavit attempted to skew the complaint in Sorema's favor, *see n.1*, *supra*, by suggesting that Mr. Swierkiewicz was not demoted in 1995; did not suffer two years of continuing discrimination thereafter; and was not fired in 1997 for discriminatory reasons but, rather, because he could not secure the severance package he demanded. All this may be fodder at trial. But none of defense counsel's contentions can be found in either the initial or amended complaint nor can they reasonably be inferred from them. Given the deferential standard of review owed Mr. Swierkiewicz's pleadings, *Conley*, *supra*, defense counsel's allegations (which themselves constitute rank hearsay) can play no part in the consideration of Sorema's motion to dismiss.

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burden to do so is "not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). *See also Hollander v. American Cyanamid Co.*, 172 F.3d 192, 199 (2d Cir.) ("The burden of proof that must be met to establish a *prima facie* case is minimal"), *cert. denied*, 528 U.S. 965 (1999).

Returning, then, to the amended complaint, Mr. Swierkiewicz did more than just plead that he was fired due to his national origin and his age. While that was enough to put Sorema on notice of his claims under Rule 8(a)(2), he also pled that he was demoted by Mr. Chavel in 1995 in favor of Nicholas Papadopoulo, a substantially younger and less qualified French national; that this had nothing to do with his own performance, which had been stellar, but rather, was due to his national origin and his age; that after his demotion he suffered two years of continuous discrimination – which took the form of being isolated and excluded from meetings and being bypassed for assignments in favor of far less qualified non-protected class employees; that he protested these unsatisfactory working conditions in a memorandum he sent to Mr. Chavel; that fifteen days later, without notice or cause, he was fired by Mr. Chavel; and that he was then denied any severance benefits despite the fact that Sorema routinely provided these benefits to other executives (five of whom he identified by name) who, unlike him, were terminated for cause.

The Court of Appeals and the District Court disregarded nearly all this evidence. In doing so, they failed to read the amended complaint in the light most favorable to Mr. Swierkiewicz. This constituted reversible error (as it did in *Reeves*, 530 U.S. at 152, where the Court reversed on similar grounds a Rule 50 judgment that had been mistakenly entered in favor of the employer). Properly considered under the simplified notice pleading standard of the Federal Rules, the allegations in Mr. Swierkiewicz's amended complaint were more than sufficient to state claims for national origin and age discrimination in connection with his employment termination by Sorema. For that reason, Sorema's motion to dismiss should not have been granted.

CONCLUSION

Nearly half a century ago, Charles Clark, then the Chief Judge for the Second Circuit, wrote: "I fear that every age must learn its lesson that special pleading cannot do the service of trial and that live issues between active litigants are not to be disposed of or evaded on paper pleadings . . ." Clark, *Special Pleading In The "Big Case"*, *supra*, 21 F.R.D. at 46. That lesson, reiterated just eight years ago in this Court's unanimous decision in *Leatherman*, needs restating yet again. On that basis and for all the other reasons stated here, the decision of the Second Circuit should be reversed.

Respectfully submitted,

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